IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-1179

JOHN ASHCROFT, Attorney General,
State of Missouri,
Appellant,

v.

ROBERT DEAN MATTIS, M.D.,
Appellee.

On Appeal from the United States Court of Appeals
for the Eighth Circuit

PETITION FOR REHEARING

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The appellee, Robert Dean Mattis, M. D., respectfully petitions this Court for a rehearing of the judgment and *per curiam* opinion of this Court entered on May 16, 1977, vacating the judgment of the United States Court of Appeals for the Eighth Circuit entered on December 1, 1976, reported at 547 F.2d 1007, on the grounds set forth herein.

I. The Decision Went on a Procedural Point Not Raised by Appellant and Not Briefed or Examined for Its Fairness or Consequences.

Because the decision of this Court went on a procedural point not raised by appellant and therefore only cursorily treated by appellee, the decision overlooks a matter of paramount importance: the constitutionality of statutes authorizing the use of deadly force in arresting any and all felons should be subject to judicial review, but under this decision that those aggrieved by the use of such deadly force do not have sufficient interest to sue for declaratory judgments, the statutes never can be tested. This result springs directly from this Court's decision in *Pierson v. Ray*, 386 U.S. 547 (1967) barring the remedy of damages against police officers who acted in reliance on statutes not theretofore declared unconstitutional. When this Court held in that case "that a police officer is not charged with predicting the future course of constitutional law," (386 U.S. at 557), it did not mean that constitutional law in that field should *have* no future course, but that is the unintended effect of the *per curiam* in this case.[1] When the plaintiff asks for damages for conduct authorized by statutes he wishes to attack, he is denied damages because of the defendants' good faith reliance on the statutes. When he thereupon turns his attack on the statutes themselves, he is told that since he has ceased to ask for damages the question he presents is hypothetical and not a case for controversy.

This is best described as whipsaw treatment. It was most recently condemned by Mr. Chief Justice Burger when attempted by the State of New Hampshire in another case under 42 U.S.C.

[1] From all that appears this Court might well have allowed declaratory relief in *Pierson*, but the peculiar chain of events therein precluded that possibility: this Court already had invalidated the statute there involved in another case after the arrests were made in *Pierson*, and hence had no occasion to pass on the statute's validity in *Pierson*. (But it did allow the claim for damages to stand on another ground.)

§ 1983, *Wooley v. Maynard*, — U.S. —, —, 97 S.Ct. 1428, 1434, n. 9 (4/20/77). Referring to a husband and wife who wished to attack a statute on identical grounds, the State told the husband that he was too late and the wife that she was too early, but this Court brushed aside such obstruction, noting that it would never "leave room for federal intervention under § 1983." Similar tactics were denounced by this Court under the very name of "whipsaw" in *Murphy v. Waterfront Commissioners*, 378 U.S. 52, 55 (1964).

II. The Decision Precludes Future Determination of the Constitutionality of Statutes on the Use of Deadly Force by Police.

Usually a statute affecting the criminal justice process can be tested in defending against a prosecution, but not the statutes here involved. No policeman can be prosecuted under these statutes for shooting a fleeing petty felon.[2] If a policeman shoots a fleeing misdemeanant he can be prosecuted, but then only the immunity given misdemeanants can be tested, and that test would be solely for the benefit of the policeman. And if the fleeing petty felon survives being shot, he is in no better position than the father of a dead one, because he will not be heard to say in court that he is going to commit another petty felony and run away and might be shot again. *O'Shea v. Littleton*, 414 U.S. 488 (1974). Only if a defendant fails to plead good faith reliance on the statutes could a suit for damages survive the initial round. But that failure could be corrected as plain error as the case progressed, because a defendant's reliance on a statute is implicit in a plaintiff's attack on the statute, and must actually be made explicit in a case brought under § 1983, where a plain-

[2] Nor could he be even under the statutes as restricted in their operation by the Court of Appeals, because appellee concedes, as he must, that that court's opinion touches R.S.Mo. §559.040 on justifiable homicide only as that statute affects civil law, not criminal liability, and the other statute involved, §544.190, has nothing to do with criminal liability.

tiff must allege that defendant acted under color of a state law or statute.[3] A simple suit for damages might slip by if the plaintiff ignored the statute and the defendant was not well enough advised to plead it, but that would be no test of the statute, and the chance of obtaining such slipshod justice is no substitute for a forthright confrontation of the issue.

In *Eisenstadt v. Baird*, 405 U.S. 438, 445-446 (1972), this Court said, "The very point of Baird's giving away the vaginal foam was to challenge the Massachusetts statute that limited access to contraceptives," yet it let him prevail in his challenge because the recipients of the contraceptives, just like policemen and of course the plaintiff in the instant case, were not subject to prosecution under the statute and hence could not test it in that way, saying "to that extent, [they] are denied a forum in which to assert their own rights." See also the cases cited there in the text and in note 6. That was a put-up case, but plaintiff did not put up the case of Michael Mattis. Surely he must be allowed to test the statutes that deprived him of his son. The point being ruled in *Eisenstadt* was purely one of standing, whereas here the point seems to be a mixture of standing and justiciability, but the same relaxation should be allowed with respect to the point here involved (the *Pierson* good faith rule), so close to that of pure standing: namely, a rule designed to keep certain defendants, rather than plaintiffs, out of court, but only to protect such defendants when they acted in good faith and need protection from substantial damages, which the defendants in this case never needed, and now they need no protection at all since they are no longer even actively in the case.

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[3] In enacting the predecessor to §1983, the Reconstruction Congress recognized that people can suffer from bad laws just as much as from bad administrators. See *Monroe v. Pape*, 365 U.S. 167, 173 (1961) and Part III *infra*.

III. The Court's Dismissal of the Case as Hypothetical Amounts to Finding Lack of Justiciability and Standing, But These Elements Exist Here Under Accepted Doctrine.

This Court in its *per curiam* in this case says that the fatal flaw was asking the District Court "to answer the hypothetical question whether the defendants would have been liable apart from their defense of good faith." Put this way, the point sounds like one of pure justiciability. But the Court then says, "No 'present right' of appellee was at stake." This is language on the point of standing, and appellee submits that only if the latter quotation is necessarily true can it be said that plaintiff asked the Court a hypothetical question. For if plaintiff had a "present right" to attack the statutes, which were the real source of his injury, then the hypothesis about the policemen, whom he didn't want to attack anyway, drops out of the picture.

And so we come to the question of standing, which appellee barely touched upon in his motion to affirm since appellant did not raise it at all,[4] and which this Court disposed of in short order, without the benefit of briefs and apparently without awareness of the havoc thereby wreaked on judicial review in this field. The traditional test for standing, harm to plaintiff, was passed by this plaintiff beyond dispute through the death of his son. *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970); *Barlow v. Collins*, 397 U.S. 159 (1970). This Court still held that ". . . whatever else the 'case or controversy' requirement embodied, its essence is a requirement of 'injury in fact' " in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 218 (1974), and adhered to the same test, variously expressed but with nothing more added, in *United States v. Richardson*, 418 U.S. 166, 179-180 (1974).

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[4] Nor was the upholding of standing by the Court of Appeals on the first appeal, 502 F2d 588 (1974), challenged in the dissenting opinion written at that time. From then till now it has been out of the case.

The more difficult question is whether the *remedy* sought and obtained by appellee from the Court of Appeals, a declaratory judgment invalidating the Missouri statutes, is sufficiently concrete to satisfy more recent pronouncements of this Court. In its *per curiam* in this case, this Court has ruled that it is not, and that is the crucial issue that must be decided. Appellee urges that it be given closer consideration in the light of its extraordinary importance as explained herein.

Warth v. Seldin, 422 U.S. 490 (1975) is one of the newer cases on standing positing the need for a concrete remedy. Yet even that case seems to regard the constitutional dimension of standing as requiring only palpable injury to the plaintiff, whereas the other limitations on standing are treated as merely "prudential" (422 U.S. at 498-499). This Court ruled, 422 U.S. at 501:

> . . . Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules. Of course, Article III's requirement remains: the plaintiff still must allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants. [Citation omitted.] But so long as this requirement is satisfied, persons to whom Congress has granted a right of action, either expressly or by clear implication, may have standing to seek relief on the basis of the legal rights and interests of others, and, indeed, may invoke the general public interest in support of their claim. [Citations omitted.]

It is submitted that Congress made just such a grant when it enacted the predecessor to § 1983, thereby providing that every person deprived of a constitutional right under color of a state statute is entitled to redress in a ". . . suit in equity, or other proper proceeding," which would certainly include, besides an injunction, the newer and milder remedy of a declaratory judgment. In *Monroe v. Pape*, 365 U.S. 167, 173 (1961), this Court

said of § 1983, "*First*, it might, of course, override certain kinds of state laws." Section 1983 is structurally connected with, and largely dependent upon, an opposition to state laws. Here is a Congressional grant of a right of action to challenge state laws which should remove all the "prudential standing rules," leaving only the requirement of injury, which abundantly exists in this case.

It is true that in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 39 (1976) this Court stated, "The necessity that the plaintiff who seeks to invoke judicial power stand to profit in some personal interest remains an Article III requirement." This leaves open the nature of that "personal interest," to be discussed below. The actual holding, however, is that the plaintiff organization could establish standing only by showing injury to its members, some of whom were also plaintiffs, and that those plaintiffs, though injured, had sued the wrong defendant. In its most concrete form, the remedy sought by appellee here is the cessation of the practice of shooting fleeing petty felons. But the persons who will fit that description, although they certainly exist, cannot even be identified, let alone being joined as plaintiffs, and their interest is purely *in futuro*. Thus appellee cannot be held to be seeking relief for third parties, and the relief he seeks for himself, invalidation of the statutes, is as concrete as the nature of this case will permit.

Of course, as pointed out in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, — U.S. —, —, 97 S.Ct. 555, 562 (1977), "economic injury is not the only kind of injury that can support a plaintiff's standing." In that case the injury was to an interest in making low-cost housing available where needed, which, when viewed apart from the profit motive as it was by this Court in that case, is largely philanthropic. In *Data Processing, supra*, 397 U.S. at 154, this Court gave as examples of sufficient interest those which are "aesthetic, conservational, and recreational," and pointed out

that a spiritual stake is sufficient to give standing to raise issues concerning the Establishment Clause and the Free Exercise Clause of the First Amendment, under the authority of *Abington School District v. Schempp*, 374 U.S. 203 (1963). The interest of Dr. Mattis that was injured is more than aesthetic, is somewhat philanthropic, and is also more than simply emotional, as this Court has characterized it. It is really spiritual, the belief in the sanctity of the family that endures past death.[5] It was not mere ornamentation when the Court of Appeals quoted from the One Hundred and Twenty-Seventh Psalm, 502 F2d at 594 (citation misprinted as Psalm 27). This belief is attacked and badly shaken when the courts deny plaintiff any relief and appear to proclaim that Michael Mattis was killed rightfully and in keeping with the Constitution of the United States. Although Mr. and Mrs. Maynard were more acutely in need of relief in *Wooley v. Maynard, supra*, than Dr. Mattis, their *interest* in preserving their spiritual sensibilities from affront by a slogan deemed profane is much the same as that of Dr. Mattis in being freed from the judgment that his son was justly dispatched as a public enemy.

IV. Lack of Standing in All Other Persons Requires According of Standing to This Injured Plaintiff in a Private Dispute With Great General Significance.

Appellee has argued herein that if he has no standing to maintain this suit, then no such suit can be maintained. It is true that this Court stated in *Schlesinger v. Reservists Committee, supra*, 418 U.S. at 227:

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[5] The sanctity of the family has just been recognized again by this Court in *Moore v. City of East Cleveland*, 45 U.S.L.W. 4550, 4552 (5/31/77), pointing out that in *Viliage of Belle Terre v. Boraas*, 416 U.S. 1 (974) it upheld an ordinance that limited the types of groups that could occupy a single dwelling unit but promoted "family needs" and "family values," 416 U.S. at 9, whereas in the case before it, "East Cleveland, in contrast, has chosen to regulate the occupancy of its housing by slicing deeply into the family itself," and hence it struck down the East Cleveland ordinance.

> The assumption that if respondents have no standing to sue, no one would have standing, is not a reason to find standing. See *United States v. Richardson*, 418 U.S. at 179.

But *Schlesinger* was a suit to bar members of Congress from holding commissions in the Armed Forces Reserve, and *Richardson* sought to compel the Secretary of the Treasury to publish an accounting of the receipts and expenditures of the Central Intelligence Agency. At the place cited above in *Richardson*, this Court said:

> In a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process. Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts.

None of the above has anything to do with the use of deadly force by a peace officer against a private citizen. No one would suggest that the Founding Fathers intended that subject matter to be kept out of court. And, while the power of judicial review of Acts of Congress had to be searched for by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch 137, 2 L.Ed. 60 (1803), the Founding Fathers made it abundantly clear in Article VI that *state* laws were to be tested against the Constitution by "the judges in every State."

If the *per curiam* in this case merely disposed of a particular case for the manner in which it was brought, even though the subject matter is life and death, perhaps no further consideration would be warranted. But where the Court has foreclosed from future consideration the whole field of the use of deadly force by police, a field in which senseless sacrifices and mount-

ing antagonisms are daily events, without briefing or argument and in a manner that must be regarded as inadvertent, then surely the Court should call for plenary presentation and another look.

Respectfully submitted,

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Certificate

I certify that the foregoing petition is presented in good faith and not for delay.

Eugene H. Buder